TRI-COUNTY CATTLEMEN'S ASSOCIATION
IDAHO CATTLEMEN'S ASSOCIATION

IBLA 80-557, 80-558 Decided December 18, 1981

Appeal from decision of State Director, Idaho State Office, Bureau of Land Management, designating four units in the Challis Planning Area, Salmon District, as wilderness study areas.

Affirmed in part; affirmed as modified in part.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   Where the Bureau of Land Management designates an inventory unit as a wilderness study area, pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976), the decision will be affirmed in the absence of a showing of compelling reasons for modification or reversal.

2. Federal Land Policy and Management Act of 1976: Inventory and Identification -- Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   While the Bureau of Land Management may inventory and identify areas of the public lands of less than 5,000 acres as having wilderness characteristics, it may not properly designate such areas as wilderness study areas under sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976), because that section only mandates review of roadless areas of 5,000 acres or more and roadless islands of the public lands.

> The nonimpairment mandate of sec. 603(c), 43 U.S.C. § 1782(c) (1976), is therefore not applicable to those areas of less than 5,000 acres. However, such areas may be managed under the general management authority of sec. 302, 43 U.S.C. § 1732 (1976), in a manner consistent with wilderness objectives, and such areas may also be recommended for wilderness designation.

APPEARANCES: W. Hugh O'Riordan, Esq., Boise, Idaho, for appellant, Tri-County Cattlemen's Association; Mike Mogensen, Executive Vice President, Idaho Cattlemen's Association, Boise, Idaho, for appellant, Idaho Cattlemen's Association; Dale D. Goble, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Tri-County Cattlemen's Association and Idaho Cattlemen's Association have appealed from a decision of the State Director, Idaho State Office, Bureau of Land Management (BLM), dated February 22, 1980, designating four units in the Challis Planning Area, Salmon District, as wilderness study areas (WSA's). The four units are Corral-Horse Basin (unit 46-11), Boulder Creek (unit 46-13), Jerry Peak (unit 46-14), and Jerry Peak West (46-14a). See 45 FR 13542 (Feb. 29, 1980).

[1] The State Director's action was taken pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1976). That section directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands which were identified during the inventory required by section 201(a) of FLPMA, 43 U.S.C. § 1711(a) (1976), as having wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131 (1976). From time to time thereafter, the Secretary is required to report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. Congress will make the final decision with respect to designating wilderness areas, after a recommendation by the President. 43 U.S.C. § 1782(b) (1976).

The wilderness characteristics alluded to in section 603(a) of FLPMA are set forth in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976):

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without

> permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

The wilderness identification and review undertaken by the State Office has been divided into three phases by BLM: Inventory, study, and reporting. The State Director's decision of February 22, 1980, marks the end of the inventory phase of the review process and the beginning of the study phase.

In their statements of reasons for appeal, appellants make four principal arguments, namely: (1) BLM failed to make detailed findings of fact thereby precluding meaningful public participation in the decisionmaking and review process; (2) designation of an area with less than 5,000 acres (unit 46-13) as a WSA was improper; (3) the four units did not satisfy the wilderness characteristics identified by section 2(c) of the Wilderness Act, supra; and (4) BLM failed to consider the importance of the four units for use in livestock grazing. 1/

In particular, appellants contend that there are indications in all of the units of "the continued presence of man" and that "[i]n order for an area to be designated as wilderness * * * the presence of man must not be evident." They point to such examples as bulldozer roads, stock ponds, fences, logging sites, spring developments, corrals, sheepherder monuments, mining sites, salt licks, irrigation ditches, sawmill sites, cabins, bridges, and cattle guards. Appellants state that the areas are used for rock hounding, hunting, sheepshearing, grazing, and by four-wheel drive vehicles. Appellants conclude that man is "not a visitor but is a permanent resident" in these areas.

Appellants also contend that there is no outstanding opportunity for solitude in the four units. They point to the wide open nature of the sagebrush and grassland and the fact that the areas are bordered

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1/ Appellants also contend that BLM failed to comply with the requirements of section 3(d)(1) of the Wilderness Act, 16 U.S.C. § 1132(d)(1) (1976). That section, however, provides procedural requirements which the Secretary must satisfy "prior to submitting any recommendations to the President with respect to the suitability of any area for preservation as wilderness." 16 U.S.C. § 1132(d)(1) (1976). It is not clear that that subsection applies to wilderness area recommendations under section 603(a) of FLPMA and, in any event, that section would not be applicable to the phase of the inventory review being considered in this case.

by roads and state and private land. In addition they state that these units are also subject to low-flying jet flights from the Mountain Home Air Force base.

Appellants' attack on the designation of the units in question is directed principally to a lack of wilderness characteristics for all four units and a lack of sufficient size for one unit. 2/

Appellants seek to impose their own set of wilderness characteristics by which to judge the wilderness potential of these units. They present a list of 13 wilderness characteristics which were apparently derived from section 2(c) of the Wilderness Act, supra. 3/ Appellants' attempt to establish that BLM's review was inadequate and that it reached the wrong result. They seek to do so by providing a unit-by-unit analysis based on their 13 criteria. However, the factors which were developed by BLM were the product of substantial public input and provide a reasonable basis for assessing wilderness potential. 4/

2/ We cannot agree with appellants' argument that BLM's procedure in selecting these WSA's has precluded meaningful public participation. At each step in the review process, BLM has solicited public input and publicly announced its decisions, providing time for comments and/or protests or appeals. We noted that during the 30-day period for protesting the intended final intensive inventory decision, only one letter was submitted. Appellants did not protest that decision.

While the State Director's final intensive inventory decision on these units did not contain specific findings, it adopted the intended final intensive inventory decision published in the Federal Register on Jan. 4, 1980 (45 FR 1159). That decision contained specific findings on each statutory criterion. The record does not support appellants' contention.

3/ The list of wilderness characteristics, most of which appellants claim BLM failed to assess, are: (1) Earth and its community untrammeled by man; (2) man is a visitor who does not remain; (3) undeveloped Federal land; (4) retaining its primeval character; (5) without permanent improvements or human habitation; (6) protected and managed so as to preserve natural conditions; (7) roadless; (8) size; (9) naturalness; (10) solitude; (11) primitive or unconfined type recreation; (12) supplemental values; and (13) possibility of returning to a natural condition.

4/ As set forth in the Wilderness Inventory Handbook (WIH) at 6, the key factors to be used in the inventory process to identify roadless areas with wilderness characteristics are:

"1. Size. At least 5,000 contiguous roadless acres of public land.

"2. Naturalness. The imprint of man's work must be substantially unnoticeable.

"3. Either:

a. An outstanding opportunity for solitude, or

b. An outstanding opportunity for a primitive and unconfined type of recreation."

To qualify for wilderness study identification an area of public land must be shown to meet both factors 2 and 3. An island may be of

Appellants have presented no justifiable reasons for expanding on or fragmenting these factors.

Concerning appellants' argument relating to the "imprints of man," as stated by section 2(c) of the Wilderness Act, the imprint of man's work must be "substantially unnoticeable" (emphasis added). 16 U.S.C. § 1131(c) (1976). There is no requirement that the hand of man be completely unnoticeable. Certain man-made structures and marks may be evident in an area without affecting its suitability for preservation as wilderness. See WIH at 12-13. Furthermore, the imprint of man must be viewed in an overall sense in order to assess its impact properly. See WIH at 13. The record indicates that BLM noted the imprint of man with respect to each of the units but concluded that it was subordinate to the natural landscape. 5/

BLM also assessed the "possibility of an area returning to a natural condition" as part of the inventory process. See WIH at 14. If it is "reasonable to expect the imprint of man's work to return or be returned to a substantially unnoticeable level either by natural processes or by hand labor," an area may be further considered for designation as a WSA. WIH at 14. Appellants argue that this supports their contention that BLM is trying to "create wilderness" in the four units. We disagree. Designation as a WSA is only a preliminary step to designation of an area for preservation as wilderness. BLM may properly assess the possibility of an area returning to a natural state prior to the end of the wilderness review process.

Regarding appellants' arguments concerning solitude, section 2(c) of the Wilderness Act, requires that an area have "outstanding opportunities for solitude or a primitive and unconfined type of recreation" (emphasis added). 16 U.S.C. § 1131(c) (1976). An area may meet either criterion. See WIH at 13. Moreover, for solitude the emphasis is on "outstanding opportunities." The opportunities need not be available at all times and at all places in an area. The record indicates that

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fn. 4 (continued)
any size. For an area of public land of less than 5,000 contiguous roadless acres to be considered for Wilderness Study Area identification, it must, in addition to possessing factors 2 and 3, be either:

1. Contiguous with land managed by another agency which has been formally determined to have wilderness or potential wilderness values, or

2. Contiguous with an area of less than 5,000 acres of other Federal lands administered by an agency with authority to study and preserve wilderness lands, and the combined total is 5,000 acres or more, or

3. Subject to strong public support for such identification and it is clearly and obviously of sufficient size as to make practicable its preservation and use in an unimpaired condition, and of a size suitable for wilderness management.

5/ Appellants have not argued that the four units fail to meet the criteria of roadlessness as set out in section 603(a) of FLPMA, supra.

the four units do provide outstanding opportunities both for solitude, because of their large size and the hilly terrain, and for primitive and unconfined recreation, such as backpacking, riding, fishing, and cross-country skiing. BLM notes that certain areas are bordered by gravel roads but that, otherwise, the sights and sounds of man do not detract from the area's outstanding opportunities for solitude.

The decision to designate an area as a WSA will be affirmed in the absence of compelling reasons for modification or reversal. The burden of showing error is on one challenging the decision. Richard J. Leaumont, 54 IBLA 242, 88 I.D. 440 (1981); Sierra Club, 54 IBLA 31 (1981). As we stated in Richard J. Leaumont, supra at 245, 88 I.D. at 491:

> These [wilderness] evaluations are necessarily subjective and judgmental. BLM's efforts are guided by established procedures and criteria, and are conducted by teams of experienced personnel who are often specialists in their respective areas of inquiry. Their findings are subjected to higher-level review before they are approved and adopted. Considerable deference must be accorded the conclusions reached by such a process, notwithstanding that such conclusions might reach a result over which reasonable men could differ.

In the present case, appellants have failed to offer compelling reasons for disturbing the State Director's assessment of the wilderness characteristics of the four units. They have not shown that he failed to consider adequately all of the factors involved. 6/ See California Association of Four-Wheel Drive Clubs, 38 IBLA 361 (1978).

[2] Finally, appellants contend that unit 46-13 cannot be designated a WSA because it contains less than 5,000 acres. The record indicates that the unit contains only 2,573 acres of land but that it is contiguous with a RARE II Further Planning Wilderness Unit 4-551. 7/ BLM excepted it from the size requirement pursuant to the size exceptions identified in the Wilderness Inventory Handbook. See WIH at 6. The initial question is whether BLM has the authority to designate an

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6/ Appellants have argued that BLM should have considered the importance of livestock grazing in the four units. However, consideration of the necessary trade-offs arising from multiple uses of an area has been committed to the study phase of the wilderness review process, which is just prior to the final determination by the Secretary as to recommendations on the suitability or nonsuitability of an area for preservation as wilderness. See WIH at 3. There will be ample opportunity for public involvement in the study phase. In addition, if livestock grazing was taking place on these lands at the time of the passage of FLPMA, it may continue in the same manner and degree as it was being conducted on Oct. 21, 1976. See 43 U.S.C. § 1782(c) (1976).

7/ RARE II is the second wilderness review of Forest Service roadless areas undertaken by the Forest Service pursuant to section 3(a) of the Wilderness Act, 16 U.S.C. § 1132(a) (1976).

area of less than 5,000 acres as a WSA pursuant to section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976).

Section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), requires the Secretary to "review those roadless areas of five thousand acres or more * * * of the public lands [8/], identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 * * *." In the WIH at 6 BLM identifies the key factors of wilderness characteristics to be assessed in the inventory process. One key factor is size. BLM lists three situations in which an area of less than 5,000 contiguous roadless acres could meet this size factor. See n.4, supra. BLM states further in the WIH at 12 that these same three situations are applicable to the assessment of the size of a unit during the intensive inventory stage. If all other factors are present, BLM acts pursuant to the guidelines in the WIH to designate units of less than 5,000 acres as WSA's.

BLM's approach is based on the definition of wilderness in section 2(c) of the Wilderness Act of 1964, which states that "[a]n area of wilderness is further defined to mean in this chapter an area * * * which * * * (3) has a least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; * * *." 16 U.S.C. § 1131(c) (1976).

While we believe BLM was entirely correct in adopting the "less than 5,000 acre" policy for identification of wilderness areas during the inventory phase, we can find no authority, statutory or otherwise, for designating an area of less than 5,000 acres as a WSA under section 603(a) of FLPMA.

Section 603(a) may be characterized as a statutory section of specific reference in that it refers specifically to the Wilderness Act of 1964. 2A C. Dallas Sands, Sutherland Statutory Construction, § 51.07 (4th ed. rev. 1973). As such, that part of the statute referred to is taken as though written into the reference statute. Id. at § 51.08. Writing the pertinent part of the Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1976), into section 603(a) of FLPMA would result in the following:

> [t]he Secretary shall review those roadless areas of five thousand acres or more * * * of the public lands, identified during the inventory required by section 1711(a) of this chapter as having at least five thousand acres of land or [as being] of sufficient size as to make practicable its preservation and use in an unimpaired condition; * * *. [Underlined portion taken from Wilderness Act]

8/ The term "public lands" is defined for purposes of its use in FLPMA as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, * * *." 43 U.S.C. § 1702(e) (1976).

This language indicates that during the inventory process required by section 201(a), 43 U.S.C. § 1171(a) (1976), BLM was to identify areas of the public lands which exhibited wilderness characteristics, including the wilderness characteristic of size. However, once the inventory stage is completed, the authority for designation of areas of the public lands as WSA's is derived from section 603(a) of FLPMA. That section directs the Secretary to review only those areas of 5,000 acres or more. Thus, it appears that section 603(a) of FLPMA established a minimum acreage requirement for WSA's.

The legislative history of FLPMA seems to support such an interpretation. The Senate version of FLPMA, S. 507, 94th Cong. 2nd Sess., 122 Cong. Rec. 4423 (1976) (designated the National Resource Lands Management Act), provided in section 102(a) for an inventory of "all national resource lands." The section further provided that "[a]reas containing wilderness characteristics as described in section 2(c) of the Act of September 3, 1964 (78 Stat. 890) shall be identified within five years of enactment of this Act." Section 103(e) of S. 507 provided:

> Areas identified pursuant to section 102 as having wilderness characteristics shall be reviewed within fifteen years of enactment of this Act pursuant to the procedures set forth in subsections 3(c) [9/] and (d) of the Act of September 3, 1964 (78 Stat. 892-893): Provided, however, That such review shall not, of itself, either change or prevent change in the management or use of the national resource lands.

Therefore, S. 507 contemplated an inventory and identification of all areas containing wilderness characteristics. It also provided for review of such areas in accordance with the procedures of section 3(c) of the Wilderness Act. Although that section mentions review of areas of 5,000 acres or more, clearly the reference to "procedures" in section 103(e) of S. 507 was directed to the series of recommendation steps necessary for an area to be designated a wilderness. The language in section 3(c) of the Wilderness Act referring to 5,000 acres or more in

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9/ Section 3(c) of the Wilderness Act of 1964, 16 U.S.C. § 1132(c) (1976), provides:

"Within ten years after September 3, 1964, the Secretary of the Interior shall review every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the national wildlife refuges and game ranges, under his jurisdiction on September 3, 1964 and shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendation * * *. A recommendation of the President for designation as a wilderness shall become effective only if so provided by an Act of Congress."

"national parks, monuments," etc., would not be incorporated in section 103(e) of S. 507 by the reference to procedures. Accordingly, that version of S. 507 did not limit the size of areas to be reviewed other than to require that such an area contain the wilderness characteristic of size, i.e., at least 5,000 acres or of sufficient size as to make practicable its preservation. The bill specifically provided that management or use of the lands was not to be affected during review.

On the other hand, section 311 of the House bill, H.R. 13777, 94th Cong. 2d Sess., 122 Cong Rec. 23442 (1976), contained much of the present language of section 603 of FLPMA. It limited the Secretary's review to those roadless areas of the public lands containing 5,000 acres or more and provided for nonimpairment of such areas during review.

In reference to the wilderness area provisions of the Senate and House bills, House Conference Report, H.R. Rep. No. 1724, 94th Cong. 2d Sess. 65, reprinted in [1976] U.S. Code Cong. & Ad. News 6125, 6237, stated:

> Both the Senate Bill and the House amendments provided for wilderness studies and inclusion of appropriate wilderness areas in the National Wilderness Preservation System. The House amendments provided specific detail for the conduct of studies, inclusion of lands in the Wilderness Preservation System, and exclusion of lands from the study provisions of S. 507. The conferees adopted the House amendments with further amendments. One affirms the right of the Secretary of the Interior to withdraw lands in study areas from the Mining Law of 1872 for reasons other than preservation of their wilderness character. Another struck out the procedures for excluding lands from study areas. [10/] [Emphasis added.]

The Senate bill was passed in lieu of the House bill after amending the Senate bill to contain much of the text of the House bill. Thus, section 311 of the House bill was adopted and became section 603 of FLPMA with only the changes mentioned in the conference report.

The House language, as characterized in the Conference report, provided for "specific detail for the conduct of studies." Since the Senate bill provided for study of all areas identified as having wilderness characteristics, it seems clear that adoption of the House version was intended to reflect a choice that the Secretary be required to study only those areas of 5,000 acres or more, i.e., exclude those areas of less than 5,000 acres from designation as WSA's under section 603(a).

10/ The conferees' amendment striking out procedures for excluding lands from study areas resulted in the deletion of section 311(d) of the House bill. That subsection provided that a recommendation by the President of unsuitability would be effective unless disapproved by a resolution of either the Senate or the House within a certain period of time. See Transcript of proceedings, Senate-House Conference on S. 507, at 93-97 (Sept. 22, 1976).

Therefore, we find that section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), does not mandate wilderness review of non-island areas of roadless public land of less than 5,000 contiguous acres. See Save the Glades Committee, 54 IBLA 215 (1981). 11/ This finding raises another question though. It is whether other authority exists which would allow BLM to pursue wilderness review of such areas. We conclude that 43 U.S.C. §§ 1712 and 1732 (1976) provide such authority. 12/ Although an area of less than 5,000 contiguous acres would not qualify as a WSA under section 603(a), BLM is not precluded from managing such an area in a manner consistent with wilderness objectives, nor is it prohibited from recommending such an area as wilderness. 13/ However, the nonimpairment mandate set forth in section 603(c), 43 U.S.C. § 1782(c) (1976), would not apply to an area of less than 5,000 acres. 14/

11/ BLM's Interim Management Guidelines (IMP), 44 FR 72013 (Dec. 12, 1979), at 6 n.1, state:

"The wilderness review required by section 603 focuses on roadless areas of 5,000 acres or more and on roadless islands. The BLM as a matter of policy has used its general management authority under section 302 and 202 of FLPMA to include in the wilderness review some roadless areas smaller than 5,000 acres."

Thus, BLM is actually in agreement that this unit (46-13) cannot be a section 603(a) WSA.

12/ BLM states in its IMP at 6 n.1, that pursuant to its general management authority it has included some areas smaller than 5,000 acres "in the wilderness review." We do not disagree that such areas may be the subject of wilderness management, but these areas do not qualify as section 603(a) WSA's.

13/ This is consistent with the view of the Solicitor as quoted in Save the Glades Committee, supra at 219, a case in which an organization was asserting that an area of less than 5,000 acres should be designated a WSA:

"The Solicitor states, in addition: The guidelines describing review of sub-sized parcels thus represents a wholly voluntary effort of the BLM, undertaken as part of its broad land management prerogative, to identify, consistent with the spirit of section 603, the wilderness characteristics of areas not subject to the wilderness review mandated by FLPMA. Such a review may lead to formal wilderness designation, in the discretion of Congress, or to cooperative or individual management by the BLM under existing land management statutes for the preservation of wilderness or other environmental, aesthetic, or recreational values. (See WIH at 6.) It is, however, an effort wholly outside the scope of section 603's wilderness review mandate."

14/ BLM states in the IMP at 6 n.1, that "[t]he management mandate in section 603(c) does not apply to roadless areas smaller than 5,000 acres." It explains further that "as a matter of policy the BLM will use its management authority under section 302 of FLPMA to apply a modified form of interim management to these areas, as is explained in Chapter I.A.5." This case does not present any issues relating to management of areas of less than 5,000 acres; therefore, our holding concerning management is limited to our conclusion that the management mandate of section 603(c) is not applicable to such areas.

What we hold, therefore, is that unit 46-13, containing 2,573 acres, does not qualify as a section 603(a) WSA. Since it cannot be a section 603(a) WSA, the management mandate of section 603(c) is not applicable. BLM may, however, because the area exhibits wilderness characteristics and because it is adjacent to RARE II lands, manage it pursuant to the general management authority (43 U.S.C. § 1732 (1976)) so as to preserve, as much as practicable, those wilderness characteristics.

Accordingly, we must modify the BLM decision, as it relates to unit 46-13, to make clear that the designation of that unit as a WSA could not have been undertaken pursuant to section 603(a).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to units 46-11, 46-14, and 46-14a, and affirmed as modified as to unit 46-13.

Bruce R. Harris
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge